Supreme Court, U.S.
FILED
MAY 29 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1330 (3)

In the Supreme Court of the United States

OCTOBER TERM, 1989

INTERNATIONAL ORGANIZATION OF MASTERS, MATES & PILOTS, ET AL., PETITIONERS

v.

TIMOTHY A. BROWN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

KENNETH W. STARR
Solicitor General
DAVID L. SHAPIRO
Deputy Solicitor General
CHRISTINE DESAN HUSSON
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

ROBERT P. DAVIS
Solicitor of Labor
ALLEN H. FELDMAN
Associate Solicitor
STEVEN J. MANDEL
Deputy Associate Solicitor
MARK S. FLYNN
Attorney
Department of Labor
Washington, D.C. 20210

BEST AVAILABLE COPY

QUESTION PRESENTED

Section 401(c) of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. 481(c), confers a right on a candidate for union office to have campaign literature distributed by the union. The question presented is whether Section 401(c) conditions that right on the reasonableness of the request for distribution, rather than on the reasonableness of a union rule restricting such requests.

TABLE OF CONTENTS

	Page
Statement	1
Discussion	7
Conclusion	19

TABLE OF AUTHORITIES

Cases:

BLE International Reform Committee v. *Sytsma*, 802 F.2d 180 (6th Cir. 1986) 16
Calhoon v. *Harvey*, 379 U.S. 134 (1964) 16
Chevron U.S.A. Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) 16
Consumer Product Safety Commission v. *GTE Sylvania, Inc.*, 447 U.S. 102 (1980) 9
Donovan v. *Metropolitan District Council of Carpenters*, 797 F.2d 140 (3d Cir. 1986) 6, 16, 17
Donovan v. *National Transient Division, International Brotherhood of Boilermakers*, 736 F.2d 618 (10th Cir. 1984), cert. denied, 469 U.S. 1107 (1985) 16
Donovan v. *Sailors' Union*, 739 F.2d 1426 (9th Cir. 1984), cert. denied, 471 U.S. 1004 (1985) 16
Dunlop v. *Bachowski*, 421 U.S. 560 (1975) 10
INS v. *Cardoza-Fonseca*, 480 U.S. 421 (1987) 9
Local No. 82, Furniture & Piano Moving v. *Crowley*, 467 U.S. 526 (1984) 10
Local 3489, United Steelworkers v. *Usery*, 429 U.S. 305 (1977) 10, 13, 14, 16
Marshall v. *Provision House Workers Union, Local 274*, 623 F.2d 1322 (9th Cir. 1980) 6, 17, 18
Wirtz v. *Hotel, Motel & Club Employees Union, Local 6*, 391 U.S. 492 (1968) 10, 13, 14

Cases—Continued: Page

Wirtz v. *Local 153, Glass Bottle Blowers Ass'n*, 389 U.S. 463 (1968) 10, 14, 16

Yablonski v. *UMW*, 71 L.R.R.M. 2606 (D.D.C. 1969) 9

Statutes and regulations:

Labor-Management Reporting and Disclosure Act, 29 U.S.C. 411 *et seq.*:

Tit. I:

§ 101(a)(1), 29 U.S.C. 411(a)(1) 9

§ 101(a)(2), 29 U.S.C. 411(a)(2) 9

Tit. IV:

§ 401, 29 U.S.C. 481 14

§ 401(c), 29 U.S.C. 481(c) ..... *passim*

§ 401(e), 29 U.S.C. 481(e) 9, 13

§ 402, 29 U.S.C. 482 10

§ 502, 29 U.S.C. 483 10

§ 504, 29 U.S.C. 504 .....

29 C.F.R.:

Section 452.67 ..... 14, 15

Section 452.69 15

Section 452.79 15

Section 452.80 ..... 8-9, 15

Miscellaneous:

105 Cong. Rec. (1959):

pp. 6475-6476 11

p. 6717 11

p. 6726 11

pp. 6727-6728 11

p. 6728 ..... 11, 12

p. 6729 11

H.R. Conf. Rep. No. 1147, 86th Cong. 1st Sess. (1959) 13

H.R. Rep. No. 741, 86th Cong., 1st Sess. (1959) .. 13

Miscellaneous—Continued: Page

Letter from R. Hunsucker to R. Lowen (July 15, 1988) 3

S. 1555, 86th Cong., 1st Sess. (1959) 11

S. Rep. No. 187, 86th Cong., 1st Sess. (1959) 10, 12, 13, 16

2 NLRB, *Legislative History of the Labor-Management Reporting and Disclosure Act of 1959* 11, 12

In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1330

INTERNATIONAL ORGANIZATION OF MASTERS, MATES & PILOTS, ET AL., PETITIONERS

v.

TIMOTHY A. BROWN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. Petitioner International Organization of Masters, Mates and Pilots (the Union) is a labor organization representing workers employed in the maritime industry as ship's officers, as pilots, and in other similar positions. Pet. App. 3a; Pet. 4; Br. in Opp. 1. Petitioners Robert J. Lowen and Elwood Kyser are officers of the Union. Pet. App. 2a; Br. in Opp. 2.

The Union conducts quadrennial elections of officers by mail ballot. Pet. App. 3a. Under the Union's nominating process, any member in good standing is eligible for election, and may be nominated at the nominating conven-

tion. Ballots containing the names of nominees are mailed to Union members within thirty days after the convention, and members are allowed ninety days from mailing to return their ballots. *Ibid.*

Respondent Timothy A. Brown is a member of the Union who sought the office of president during the Union's 1988 election. Pet. App. 2a, 1c; Pet. 6. He wished to distribute campaign literature to Union members at his own expense before the August 1988 nominating convention. Pet. App. 3a-4a; Br. in Opp. 2. Because, as is generally the case, the Union leadership had exclusive access to the membership mailing list, Brown asked the Union to provide mailing labels containing the names and addresses of voting Union members. Pet. App. 4a; Br. in Opp. 3. Brown sought a pre-convention mailing of his campaign literature in order to attract support from other members before they were likely to have committed their votes to other candidates or declared their own candidacy. Br. in Opp. 2. The desirability of an early mailing is heightened in the context of this Union because most of its members work at sea for long periods of time and mail is the only effective means of communicating with them. Br. in Opp. 1-2. An early mailing would also increase the opportunity of Union members to confer and to discuss—for example, at the nominating convention—the issues raised in the mailing. See Pet. App. 5c-6c.

On June 7, 1988, petitioner Kyser denied Brown's request for distribution on the ground that the Union constitution did not authorize the distribution of campaign literature until after the nominating convention, at which a ballot committee and "impartial balloting agency" would be designated as responsible for such distribution. Pet. 6-7; Br. in Opp. 3. Brown appealed this decision to the Union's executive board, which denied the request on July 6, 1988. Br. in Opp. 3.

2. Brown then filed this action in district court, seeking a preliminary injunction directing petitioners to comply with Section 401(c) of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U.S.C. 481(c). Section 401(c) requires unions covered by the Act "to comply with all reasonable requests of any candidate to distribute by mail or otherwise at the candidate's expense campaign literature in aid of such person's candidacy to all members in good standing of such labor organization." Soon after Brown filed suit, the Director of the Department of Labor's Office of Elections, Trusteeships and International Union Audits, who had been furnished with copies of Brown's requests and petitioners' denials, informed the Union that the denials were contrary to the requirements of the Act. Letter from R. Hunsucker to R. Lowen (July 15, 1988); Pet. App. 7a-8a.

On July 25, 1988, the district court ruled that petitioners had violated Section 401(c) by refusing Brown's pre-convention mailing request. Pet. App. 1c-6c. The court therefore issued a preliminary injunction directing petitioners to deliver a set of mailing labels bearing the names and addresses of all Union members to a mutually acceptable mailing service so that Brown's campaign literature could be distributed. Pet. App. 7c-8c.

The district court held that, in determining the lawfulness of a union's refusal to honor a candidate's request to distribute campaign literature, the focus must be on the reasonableness of the request rather than on the reasonableness of the union rule under which the request was denied. Pet. App. 2c-3c. The court found this result mandated by the clear language of the statute, which requires a union "to comply with all reasonable requests of any candidate." *Ibid.* (quoting Section 401(c)). In the district court's view, a court could not give effect to a union rule if "its application results in the rejection of a reasonable request made by a candidate." Pet. App. 3c. In this case,

since Brown's request "to distribute his campaign literature approximately one month before the union's convention is held * * * is clearly reasonable," the court concluded that petitioners had violated the Act by refusing to honor it. *Ibid.*

The court ruled in the alternative that even if the reasonableness of a union's rule governs the LMRDA inquiry, petitioners had violated the Act because the Union rule involved in this case was unreasonable. Pet. App. 4c. The court held that pre-convention communication with Union members was necessary to an effective candidacy so that non-incumbent candidates could have the convention delegates – themselves important leaders of the Union and potential sources of aid in the post-convention election period – consider the merits of a candidacy before the convention. The court found it "virtually impossible" for non-incumbent candidates to elicit needed support at the convention itself without the opportunity in advance to introduce themselves and their ideas by mailings. Pet. App. 4c-5c. The court noted in addition that the nature of Union members' work, which takes them out to sea for long periods of time, "underscores the need for an earlier mailing," since "it is unrealistic to believe that union members will have conferred with one another concerning the merits of the respective candidacies before casting their ballots within the ninety day [election] period." Pet. App. 5c-6c.

3. A divided panel of the court of appeals affirmed the preliminary injunction on the ground that Brown's request for campaign literature distribution before the nominating convention was reasonable. Pet. App. 1a-15a.[1] The majority agreed with the district court that Section 401(c)

[1] The district court had entered a preliminary injunction, but the court of appeals, after noting that the district court's opinion and order "in effect constituted a decision on the merits," "affirm[ed] the decision * * * as one on the merits." Pet. App. 2a-3a.

conditions the right of a candidate to distribution of campaign material solely on the reasonableness of the request, not on the reasonableness of any union rule. Pet. App. 5a-6a. "[M]aking the issue the reasonableness of the union by-law," the court noted, "stands the statute on its head" by "render[ing] union by-laws superior to the congressional mandate and [by] provid[ing] dissident unions with a ready means for nullifying the statute's command." Pet. App. 14a. In addition, the majority observed that its reading accorded with the construction of the statute adopted by the Secretary of Labor, whose "opinion [is] entitled to consideration by this Court and is not to be lightly disregarded." Pet. App. 7a-8a. The court also found the Secretary's construction to be "in clear accord" with Congress's intent to ensure union democracy by moderating the advantages of incumbents who have "exclusive control of the union membership lists" between elections. Pet. App. 8a-9a.

Noting that the Union had made no claim that Brown's request was unreasonable, the majority held that the "manifest result" of denying that request pursuant to the Union's rule would be to favor incumbents. Pet. App. 10a. Because the incumbents had had four years to communicate with Union members and "to cultivate their relations with the local union officers who would be expected to have the greatest influence with the rank and file," the court concluded that "[t]he advantages of the union by-law to the incumbent cannot be questioned." Pet. App. 10a-11a.

The majority in turn rejected the Union's argument that the use of its rule was permissible because it was a reasonable method of satisfying the Act's prohibition against discrimination among candidates with respect to campaign literature distribution. Pet. App. 11a. As the court reasoned, granting Brown's request would not further discrimination because any other candidate for office could assert the same right. Rather, granting the request would "reduce[] the discrimination of exclusive control by

the union incumbents over the electoral lists." Pet. App. 12a.

Finally, the majority recognized that its decision created a conflict with the Third Circuit's decision in *Donovan* v. *Metropolitan District Council of Carpenters*, 797 F.2d 140 (1986), holding that a union's refusal to release mailing labels before a date specified in a union rule was permissible because the rule was a reasonable one. Pet. App. 15a. The court reiterated, however, that its reasoning left it no choice but to disagree with the Third Circuit. *Ibid.*

Judge Hall, in dissent, concluded that any individual request for distribution that conflicts with established union procedures is per se unreasonable unless the union's procedures are shown to be unfair or discriminatory. Pet. App. 16a. He asserted that the majority's approach prevented a request for distribution from being examined within its "underlying factual context." Pet. App. 18a. In addition, he faulted the approach as sanctioning judicial intrusion into internal union affairs, absent an indication that the union had distorted the democratic process. Pet. App. 19a. By contrast, he noted and approved the Third Circuit's decision in *Metropolitan District Council of Carpenters* and the Ninth Circuit's per curiam decision in *Marshall* v. *Provision House Workers Union, Local 274*, 623 F.2d 1322 (1980), which he characterized as holding that "a candidate's compliance with reasonable nondiscriminatory procedures is relevant to whether a mailing request is itself reasonable." Pet. App. 20a.[2]

[2] In *Provision House*, the court upheld as reasonable a union's application of a rule requiring candidates to make requests for distribution of campaign literature within ten days after nominations were received. The Ninth Circuit apparently assumed that the proper focus was on the validity of the union rule; unlike the Third and Fourth Circuits, it did not clearly consider whether the reasonableness of the request rather than the rule should be dispositive.

The Fourth Circuit granted petitioners' suggestion for rehearing en banc; although the Secretary had not participated at earlier stages of the litigation, she filed a brief as amicus curiae supporting respondent and participated in oral argument before the en banc court. The full court adopted the panel majority's opinion affirming the grant of the preliminary injunction and upholding the Secretary's interpretation of Section 401(c). Pet. App. 1b-3b. Judge Hall adhered to his earlier dissent, and Judge Phillips filed a separate dissenting opinion in which he supported Judge Hall's views. Pet. App. 3b-4b.

DISCUSSION

Section 401(c) of the LMRDA provides that a labor organization has a duty to comply with "all reasonable requests" by candidates for union office to distribute their campaign literature to all members of the union in good standing. The court of appeals correctly held that in determining whether a union's refusal to comply with a candidate's request offends this provision, a court should assess the reasonableness of the candidate's request, rather than the reasonableness of the union rule under which the request was denied. Pet. App. 6a, 13a. The court of appeals' holding adheres to the language of the provision, best implements the purposes of the statute, and accords with the interpretation of the Secretary of Labor, who is charged with the enforcement of the Act. However, as the court of appeals (Pet. App. 15a), petitioners (Pet. 15), and respondent (Br. in Opp. 10) acknowledge, the decision squarely conflicts with the holding of at least one other court of appeals. We see little chance that the courts of appeals, one of which decided the issue en banc, will themselves reconcile their diverse approaches. In addition, the issue is of substantial importance to the administration of Title IV of the LMRDA and arises with considerable

frequency. Because continued uncertainty over the proper interpretation of Section 401(c) will inhibit national enforcement of that provision, this Court should grant a writ of certiorari to resolve the issue.[3]

1. The court of appeals' conclusion is directed by the text of Section 401(c). That section provides in relevant part (emphasis added):

> Every national or international labor organization, * * * and every local labor organization, and its officers, *shall be under a duty*, enforceable at the suit of any bona fide candidate for office in such labor organization in the district court of the United States in which such labor organization maintains its principal office, *to comply with all reasonable requests of any candidate to distribute by mail or otherwise at the candiate's expense campaign literature in aid of such person's candidacy* to all members in good standing of such labor organization * * *.

Section 401(c) thus imposes an obligation on unions to distribute campaign literature at a candidate's expense in response to "all reasonable requests of any candidate."[4]

[3] On July 28, 1988, the day it heard oral argument, the panel issued an order denying petitioners' application for a stay of the preliminary injunction; petitioners thereafter complied with Brown's distribution request. The union subsequently conducted its election and Brown lost the election by a small margin. However, the propriety of that election has been challenged by the Secretary on a number of other grounds, and if a rerun election is necessary, Brown anticipates that the distribution issue will arise again. *Dole* v. *International Organization of Masters, Mates and Pilots*, No. MJG-89-2071 (D. Md.); Br. in Opp. 7 n.1. In addition, Brown has represented that he will seek to exercise the same right in the Union's next regularly scheduled election. *Ibid.* We therefore agree with the parties that, because the controversy is capable of repetition yet evading review, the en banc court had, and this Court has, jurisdiction to consider this matter. See *Ibid.*

[4] A union member need not be formally nominated in order to be a bona fide candidate entitled to exercise Section 401(c) rights. 29 C.F.R. 452.80; see *Yablonski* v. *UMW*, 71 L.R.R.M. 2606 (D.D.C. 1969).

The meaning of the provision is clear: it "conditions the right of the contesting union office seeker to have his campaign material distributed only on the *reasonableness of his request.*" Pet. App. 5a (emphasis added).

When Congress wanted the courts to focus on the reasonableness of union rules, it knew how to say so. Elsewhere in the LMRDA, Congress expressly identified the circumstances in which it intended reasonable union rules to control a union member's rights. See, *e.g.*, Section 401(e), 29 U.S.C. 481(e) ("every member in good standing shall be eligible to be a candidate and to hold office (subject to section 504 of this title and to reasonable qualifications uniformly imposed)"); Section 101(a)(1), 29 U.S.C. 411(a)(1) (providing union members with equal rights and privileges to nominate candidates, to vote in elections or referendums, to attend union meetings and to participate in deliberations and voting at such meetings, "subject to reasonable rules and regulations in [a labor organization's] constitution and bylaws"); Section 101(a)(2), 29 U.S.C. 411(a)(2) (providing union members with rights to free speech and assembly "subject to the organization's established and reasonable rules pertaining to the conduct of meetings"). "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 432 (1987); see also *Consumer Product Safety Commission* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 109 (1980).

The structure of the statute supports the court of appeals' reading of Section 401(c). Section 401(c)'s requirement is the only obligation imposed under Title IV that is enforceable by private suit. Moreover, candidates need

not exhaust internal union remedies, or await the completion of the election (or the failure to hold an election within the statutorily prescribed time) before seeking relief. Compare 29 U.S.C. 482, 483; see *Local No. 82, Furniture & Piano Moving* v. *Crowley*, 467 U.S. 526, 539-540 & n.15 (1984); *Dunlop* v. *Bachowski*, 421 U.S. 560, 566-567 (1975). The other obligations imposed by Title IV are subject to such requirements in order to assure unions a "maximum amount of independence and self-government" by giving them every opportunity to correct their errors. S. Rep. No. 187, 86th Cong., 1st Sess. 21 (1959); *Wirtz* v. *Local 153, Glass Bottle Blowers Ass'n*, 389 U.S. 463, 472-473 (1968). By contrast, Congress in Section 401(c) provided aggrieved candidates with a unique device immediately and directly to vindicate their basic right to disseminate information to the union electorate. Thus, by its enforcement mechanism as by its terms, Section 401(c) sharply limits union prerogatives in favor of the rights of individual union members.

2. The court of appeals' straightforward reading of the statute also best implements the provision's purpose.

a. "The basic objective of Title IV * * * is to guarantee 'free and democratic' union elections modeled on 'political elections in this country.'" *Local 3489, United Steelworkers* v. *Usery*, 429 U.S. 305, 309 (1977) (quoting *Wirtz* v. *Hotel, Motel & Club Employees Union, Local 6*, 391 U.S. 492, 504 (1968)); see also *Glass Bottle Blowers Ass'n*, 389 U.S. at 470; *id.* at 475 (Act designed to protect "vital public interest" in free and democratic union elections). Faced with revelations of union corruption, dictatorial practices, and racketeering, Congress determined "to protect the rights of rank-and-file members to participate fully in the operation of their union through processes of democratic self-government, and, through the election process, to keep the union leadership responsive to the membership." *Hotel Employees*, 391 U.S. at 497.

The ability of a candidate to communicate with union members through distribution of campaign literature is central to a free and democratic election process. Only if a candidate is able to speak to the rank and file in an effective manner will union members be able to make the informed choice that Congress viewed as critical to union democracy. Thus, it is not surprising that the provision enacted as Section 401(c) came to the floor of Congress as part of a package designed as a "Bill of Rights" for union members.[5] Congress's emphasis in Section 401(c)—as it demonstrated by making the section enforceable by a private right of action (see pp. 9-10, *supra*)—was to provide safeguards that could not be moderated by those controlling the unions.

Moreover, in enacting Section 401(c), Congress specifically recognized that challengers were at a severe disadvantage vis-a-vis incumbents who had long had access to union membership lists and had for years been able to communicate with union members on a regular basis through official union channels.[6]

---

[5] See 105 Cong. Rec. 6717 (1959) (statement of Sen. Kuchel), *reprinted in* 2 NLRB, *Legislative History of the Labor-Management Reporting and Disclosure Act of 1959*, at 1229-1230; [hereinafter *Leg. Hist.*]; 105 Cong. Rec. 6721 (1959) (statement of Sen. Javits), 2 *Leg. Hist.* 1238; 105 Cong. 6728 (1959) (statement of Sen. Javits), 2 *Leg. Hist.* 1240; 105 Cong. Rec. 6729 (1959) (statement of Sen. Clark), 2 *Leg. Hist.* 1242.

[6] The language substantially enacted as Section 401(c) was introduced by Senator Javits (105 Cong. Rec. 6727-6728 (1959), 2 *Leg. Hist.* 1240) to replace an earlier "Bill of Rights" amendment to S. 1555, 86th Cong., 1st Sess. (1959), introduced by Senator McClellan (105 Cong. Rec. 6475-6476 (1959), 2 *Leg. Hist.* 1102). Senator McClellan voiced the concern that the Javits amendment might be less effective than the McClellan amendment in restricting the power of

By contrast, the standard advocated by petitioners—approving denials of distribution requests based on "reasonable" union rules—meets none of these congressional concerns. The proposed standard, instead of recognizing an individual right for the courts to apply independently, by its very terms defers to existing union rules. To require only that rules controlling distribution requests be "reasonable" (rather than that the requests themselves meet that standard) would inevitably favor the current union leadership, and would thus undermine Congress's purpose of moderating the incumbent's advantage.

Nor does the legislative history of Section 401(c) suggest that union rules should play a dispositive role in the inquiry. To the contrary, the Senate report (concerning language similar to that later introduced on the floor) and the Conference report simply reiterate the duty of unions to comply with the "reasonable requests" of candidates. See S. Rep. No. 187, *supra*, at 46 ("Local unions and their officers are forbidden to discriminate in favor of or against any candidate for union office with respect to the use of the union's list of members in good standing and are required to comply with *all reasonable requests* of any

---

"incumbent officers" who are "able to perpetuate themselves in office" by use of membership lists:

> The one who was in office would know how to line up his forces, and so forth; but a candidate who was not in office would not have a [membership] list and would not have all that information. This amendment would simply permit him to send his campaign material to the union and have the union mail it out.

105 Cong. Rec. 6728 (1959), 2 *Leg. Hist.* 1240. Senator McClellan was assured by Senator Javits that in such circumstances the complementary clause of Section 401(c) that prohibits discrimination in the use of membership lists would assure a candidate the right to obtain a membership list if necessary to cure the discrimination. 105 Cong. Rec. 6728 (1959), 2 *Leg. Hist.* 1241.

candidate for distribution of his campaign literature by the unions, but at the candidate's expense, to members in good standing on the union's roster of members.") (emphasis added); H.R. Conf. Rep. No. 1147, 86th Cong., 1st Sess. 33 (1959) ("Subsection (b) of section 401 of the Senate bill [adopted by the Conference Committee] contains a provision making it the duty of each union and its officers to comply with *reasonable requests* of candidates to distribute, at the candidates' expense, campaign literature to all members of the union") (emphasis added). This Court has rejected giving a "broad reach" even to those provisions of Title IV, such as Section 401(e), that explicitly cede authority to union rulemaking. *Local 3489*, 429 U.S. at 309; *Hotel Employees*, 391 U.S. at 499. *A fortiori*, it is not proper to stretch the language of Section 401(c) to imply such authority.

b. Petitioner argues (Pet. 12) that the "reasonable rule" standard better serves Congress's desire to minimize governmental interference with union self-governance. Petitioner is mistaken on several counts.

First, while Congress recognized that "[a] strong independent labor movement is a vital part of American institutions," it determined that "[n]evertheless, effective measures to stamp out crime and corruption and guarantee internal union democracy, cannot be applied to all unions without the coercive powers of government." S. Rep. No. 187, *supra*, at 5, 6; H.R. Rep. No. 741, 86th Cong., 1st Sess. 6 (1959); see also S. Rep. No. 187, *supra*, at 20. Second, Congress also determined that establishing certain critical protections for individual union members would *itself* minimize governmental interference into union affairs. "Given the maintenance of minimum democratic safeguards and detailed essential information about the union, the individual members are fully competent to regulate union affairs." S. Rep. No. 187, *supra*, at 7; see also *id.* at 19-21; H.R. Rep. No. 741, *supra*, at 15-16. This

theme is reflected in provisions of Title I, the "Bill of Rights" for union members. *Hotel Employees*, 391 U.S. at 497-498. But "Title IV, and particularly § 401, was the vehicle by which Congress expressed its policy." *Id.* at 498. As this Court has put it,

> Congress did not saddle the courts with the duty to search out and remove improperly entrenched union leaderships. Rather, Congress chose to guarantee union democracy by regulating not the results of a union's electoral procedure but the procedure itself. Congress decided that if the elections are "free and democratic," the members themselves are able to correct abuse of power by entrenched leadership.

Local 3489, 429 U.S. at 311-312. In short, it was Congress's judgment that the federal interest in avoiding undue intervention into internal union matters is furthered by stringent enforcement of union members' basic rights as they are articulated in Section 401. See also *Glass Bottle Blowers Ass'n*, 389 U.S. at 471 ("[T]he freedom allowed unions to run their own elections was reserved for those elections which conform to the democratic principles written into § 401."); accord *Hotel Employees*, 391 U.S. at 496-497.[7]

---

[7] Petitioner also suggests (Pet. 16-18) that the court of appeals erred because imposition of uniform union rules governing literature distribution would lessen the opportunity for unions to discriminate among candidates. But Section 401(c) contains an explicit prohibition against union discrimination in responding to candidates' literature distribution requests, and union members therefore are protected from disparate application of the "reasonable request" standard. See also 29 C.F.R. 452.67. Moreover, as the court of appeals held, "[t]here is no conceivable way in which the granting of plaintiff's request will work a discrimination against any other union members" because "any candidate, whether an incumbent or an insurgent, has the same rights as the plaintiff." Pet. App. 12a-13a.

3. As the court below noted, the Secretary of Labor, who has the authority to enforce the provisions of Title IV, including Section 401(c), consistently has interpreted the statute as requiring unions to comply with all reasonable requests for distribution. See 29 C.F.R. 452.67 ("[t]he Act imposes the duty on the union to comply with *all reasonable requests* of any candidate to distribute his campaign literature to the membership at his expense") (emphasis added);[8] 29 C.F.R. 452.69 (providing that "a union and its officers must honor a candidate's request for distribution where the candidate is willing and able to bear the expense of such distribution"); see also 29 C.F.R. 452.79, 452.80. In this case, the Director of the Office of Elections, Trusteeships and International Audits of the Department of Labor advised petitioners by letter that the Union's denial of respondent's request appeared to be unlawful. Pet. App. 7a-8a.

---

[8] Judge Hall is incorrect in suggesting (Pet. App. 21a n.2) that the Secretary's position is inconsistent with the provision of Section 452.67 that "[i]n order to avoid charges of disparity of treatment among candidates, it is advised that a union inform all candidates in advance of the conditions under which distribution will be made and promptly advise them of any change in those conditions." As the district court aptly noted (Pet. App. 3c), "although a union certainly may – indeed should – adopt a rule known to all candidates in advance setting forth the terms and conditions under which campaign literature will be distributed by the union, in evaluating the validity of the rule a court must inquire not simply whether the rule may be said to be 'reasonable' but whether its application results in the rejection of a reasonable request made by a candidate." Neither the Secretary nor the court of appeals has said that union rules are impermissible, only that unions must draft them in such a way that reasonable requests by candidates will be honored. In assessing the reasonableness of a request, a reviewing court may consider the union's concerns as expressed in the union rule, along with other factors such as the geographic size of the union, the size of the union membership, the type of election (direct referendum or delegate), and the timing of the candidate's request.

This Court has consistently recognized the "special knowledge and discretion" of the Secretary in the administration of Title IV. *Calhoon* v. *Harvey*, 379 U.S. 134, 140 (1964); see *Local 3489*, 429 U.S. at 313; *Glass Bottle Blowers Ass'n*, 389 U.S. at 473; see also S. Rep. No. 187, *supra*, at 34 (noting that the LMRDA "endows the Secretary of Labor with broad power to insure effectuation of its objectives"). The court of appeals thus correctly concluded that the Secretary's view was entitled to deference. See, *e.g.*, *Donovan* v. *National Transient Division, International Brotherhood of Boilermakers*, 736 F.2d 618, 621 (10th Cir. 1984) (deference is owed to Secretary's LMRDA interpretation "unless there are compelling indications that it is wrong"), cert. denied, 469 U.S. 1107 (1985); accord, *BLE International Reform Committee* v. *Sytsma*, 802 F.2d 180, 188 (6th Cir. 1986); see also, *e.g.*, *Donovan* v. *Sailors' Union*, 739 F.2d 1426, 1429 (9th Cir. 1984), cert. denied, 471 U.S. 1004 (1985). While we believe the language of the statute is itself dispositive, the Secretary's interpretation is, at the very least, "based on a permissible construction of the statute" and should be given effect. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984).

4. Although the decision below is correct, there is a direct conflict among the circuits on the standard for determining a union's obligation to distribute campaign literature under Section 401(c). In *Donovan* v. *Metropolitan District Council of Carpenters*, 797 F.2d 140, 143 (1986), the Third Circuit expressly rejected the Secretary's position that "the district court [had] erred in focusing on the reasonableness of the [union's] *rule* governing requests to distribute literature, rather than on the reasonableness of the request itself." In that case, a candidate for the office of union president asked the union to distribute his campaign literature; the union denied the request on the ground that it was premature under a union

rule providing that campaign distribution requests would be honored only after a certain date (five weeks before ballots were mailed to union members and seven weeks before they were returnable). 797 F.2d at 144. The district court found that it would not interfere with union business to permit a candidate access to the mailing list for distribution purposes before the date established by the union rule. *Id.* at 141-142. The court focused, however, on its determination that the union rule was reasonable, and concluded that the union had therefore not violated the Act in denying the request. *Id.* at 141-142; 143-144. The court of appeals affirmed, ruling that a union may adopt and enforce reasonable, non-discriminatory rules for the distribution of campaign literature. *Id.* at 144. In its view, a focus on the union rule rather than on the candidate's request was proper because permitting the imposition of uniform union rules "avoids even the appearance of disparate treatment" in responding to literature distribution requests. *Ibid.* In addition, the court concluded, such a focus furthers the policy of minimim governmental encroachment on union autonomy by "minimizing judicial second-guessing." *Ibid.*

The present decision is also in considerable tension, if not direct conflict, with another case, *Marshall* v. *Provision House Workers Union, Local 274*, 623 F.2d 1322 (9th Cir. 1980). The district court in *Provision House* ruled that the union "did not fail to comply with reasonable requests [by the challengers]" when it refused campaign literature distribution requests that were untimely under a union rule requiring that such requests be made within ten days of the nominating meeting. 623 F.2d at 1324. The court of appeals rejected the Secretary's argument that because the rule had been unreasonably applied, distribution requests that violated the rule were not necessarily unreasonable. *Id.* at 1325. The court did not specifically discuss the distinction between a standard that focuses on the reasonableness of the request and one that focuses on

the reasonableness of a union rule. Nevertheless, it accepted the district court's determination that enforcement of the union rule was necessary because exceptions would undercut the purpose of the rule "to eliminate the potential for discrimination among candidates by establishing a uniform set of standards governing all candidates." *Id.* at 1326.

5. The ability of candidates to distribute campaign literature—the only effective method of communicating with the rank and file—is an essential part of Title IV's mandate of free and open union elections. The standard governing the distribution requirement is therefore of central importance to the statutory scheme. Furthermore, complaints alleging unlawful denials of campaign literature distribution requests arise with some frequency. We have been informed that since January 1, 1987, the Department of Labor's Office of Labor-Management Standards has received approximately 15 complaints of unlawful refusal to distribute campaign literature and has filed seven lawsuits alleging such violations. The differing judicial standards for resolving these complaints create uncertainty and inhibit uniform national enforcement. These factors weigh heavily in favor of review.

Notwithstanding the importance of the issue, respondent argues against certiorari principally on the grounds that the decision below is correct, that the question presented could benefit from further development in the courts of appeals, and that the court of appeals' judgment could be upheld even under the more restrictive standard advocated by petitioners. Although these arguments are not without some force, they are outweighed by the benefits of immediate review by this Court.

First, while continued debate in the courts of appeals may further elaborate the issue, the decisions of the Third and Fourth Circuits are fully reasoned. In our view, they furnish more than a sufficient basis for the immediate re-

view by this Court that the importance of the issue warrants. Second, there is no reason to believe that the Third Circuit will retreat from its current position, and the en banc Fourth Circuit has for its part clearly stated its view to the contrary. Thus, while the district court in this case did hold in the alternative that the Union rule was unreasonable, the court of appeals did not rely on that alternative holding and has established en banc circuit precedent endorsing the "reasonable request" standard. Accordingly, we believe this is an appropriate case in which to resolve the issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

DAVID L. SHAPIRO
Deputy Solicitor General

CHRISTINE DESAN HUSSON
Assistant to the Solicitor General

ROBERT P. DAVIS
Solicitor of Labor

ALLEN H. FELDMAN
Associate Solicitor

STEVEN J. MANDEL
Deputy Associate Solicitor

MARK S. FLYNN
Attorney
Department of Labor

MAY 1990

U.S. GOVERNMENT PRINTING OFFICE 1990—262 203/00918